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IN THE

# Supreme Court of the United States

October Term, A. D. 1944

No. 1286

Wisconsin Public Service Corporation,

*Petitioner,*

vs.

Federal Power Commission,

*Respondent.*

## PETITION OF WISCONSIN PUBLIC SERVICE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. G. HARDGROVE,
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FRED W. GENRICH,
*Counsel for Petitioner.*

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*Of Counsel.*

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## PETITION OF WISCONSIN PUBLIC SERVICE CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Wisconsin Public Service Corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment of that court entered on the 26th day of February, 1945, in the case of Wisconsin Public Service Corporation, petitioner, vs. Federal Power Commission, the docket number of which in said court is 8427. A certified transcript

of the record in the case, including proceedings in said Circuit Court of Appeals, is furnished herewith.

## SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

On July 30, 1943, the Federal Power Commission in proceedings before it ordered petitioner to file an application for a license under the Federal Power Act for the operation and maintenance of Tomahawk Dam on the Wisconsin River in Lincoln County, Wisconsin.

Petitioner filed with the Federal Power Commission on August 26, 1943, an application for rehearing, and said application for rehearing was denied on the 21st day of September, 1943.

Petitioner thereupon and on October 5, 1943, filed with the United States Circuit Court of Appeals for the Seventh Circuit a petition for review of said order of the Federal Power Commission.

The said Circuit Court of Appeals on February 26, 1945, affirmed said order.

## JURISDICTION

The bases upon which it is contended that this court has jurisdiction to review the judgment are:

1. The statute provides that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it, with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

2. The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed is February 26, 1945.

3. The statutes under which jurisdiction is invoked are Section 240(a) of the Judicial Code, 28 U.S.C.A. § 347, and Section 313 of the Federal Power Act (16 U.S.C.A., § 825 (l)).

4. The Federal Power Commission in proceedings before it ordered the petitioner to make application for a license under the Federal Power Act to maintain and operate a dam across the Wisconsin River at Tomahawk, Lincoln County, Wisconsin. Upon a petition filed with the United States Circuit Court of Appeals for the Seventh Circuit to review said order of the Federal Power Commission, said Circuit Court of Appeals affirmed the order of the Federal Power Commission.

5. The cases believed to sustain the jurisdiction of the court are:

**Forsyth vs. Hammond, 166 U. S. 506;**
**American Construction Company vs. Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372;**
**Montana Mining Company, Limited vs. St. Louis Mining and Milling Company, 204 U. S. 204;**
**Warner vs. New Orleans, 167 U. S. 467.**

## QUESTIONS PRESENTED

1. Does the Federal Power Commission have jurisdiction and authority to require the licensing of dams in navigable waters in those cases where, as in the instant case, the dam was constructed under a license from a state prior to 1890 when Congress entered the field of regulation?

2. Is not a dam so constructed expressly exempted from the operation of the Federal Power Act by reason of the following language of Section 23(a) thereof:

> "The provisions of this Part shall not be construed as affecting any permit * * * heretofore granted * * * or as affecting any authority heretofore given pursuant to law, * * *."

And do not the words "any permit * * * given pursuant to law, * * *" include a permit granted by a state prior to the time when Congress entered the field of regulation?

3. Does not a proper construction of the Federal Power Act require that, before the Federal Power Commission may order the taking out of a license thereunder, the stream involved shall be "used or suitable for use for the transportation of persons or property in interstate or foreign commerce;" or is the fact that a stream is a navigable water of the United States by reason of a prior use, which use has long since ceased, alone sufficient to give the Federal Power Commission jurisdiction to require a license thereunder? This question is predicated on the premise that the record discloses that the interests of interstate or foreign commerce are not affected by the dam.

4. Is there substantial evidence to support the finding of the Commission that the interests of interstate or foreign commerce would be affected by the dam here involved?

## REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI

The discretionary power of this court is invoked upon the following grounds:

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law involving the construction of the Federal Power Act in a way probably in conflict with applicable decisions of the Supreme Court of the United States, and in conflict with the intended construction to be placed on the statute, as indicated in the discussion in Congress on the subject of its construction.

2. The Circuit Court of Appeals for the Seventh Circuit has decided a question of federal law of general importance which has not been but should be settled by the Supreme Court of the United States.

3. The final adjudication by this court of the questions involved is desirable, as such questions affect many dams and other structures in navigable waters of the United States which were constructed under state authority prior to the time the Congress entered into the field of regulation.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and to send to the Supreme Court of the United States for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings had in the case above referred to, decided on the 26th day of February, 1945, to the end that said case, together with the judgment and decision therein rendered, may be reviewed and determined by this court as to the questions presented hereby, and that the said decision or judgment may be reversed by this court, and that your petitioner may have such other and further relief in the premises as to this court may seem proper and just.

Respectfully submitted,

J. G. HARDGROVE,
BERT VANDERVELDE,
FRED W. GENRICH,
*Counsel for Petitioner.*

MILLER, MACK & FAIRCHILD,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not at the time of printing of this brief been reported. It is reproduced beginning at page 644 of the Record.

### Jurisdiction

The grounds for jurisdiction are:

1. The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit to be reviewed is February 26, 1945.

2. The judgment was rendered in a proceeding in the Circuit Court of Appeals for the Seventh Circuit to review an order of the Federal Power Commission, which order required petitioner to apply for a license under the Federal Power Act to maintain a dam in the Wisconsin River. Said Circuit Court of Appeals affirmed the order of the Federal Power Commission.

3. The statutes under which jurisdiction is invoked are Section 240 (a) of the Judicial Code, 28 U.S.C.A., § 347, and Section 313 of the Federal Power Act, 16 U.S.C.A., § 825 (l).

The first of said statutes provides that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon petition of a party to require by certiorari that the cause be certified to the Supreme Court of the United States for determination by it, with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

4. The cases believed to sustain the jurisdiction of the court are:

Forsyth vs. Hammond, 166 U. S. 506;
American Construction Company vs. Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372;
Montana Mining Company, Limited vs. St. Louis Mining and Milling Company, 204 U. S. 204;
Warner vs. New Orleans, 167 U. S. 467.

## STATEMENT OF THE CASE

On May 27, 1937, petitioner filed with the Federal Power Commission its Declaration of Intention to reconstruct the dam in the Wisconsin River at Tomahawk, Wisconsin. (R. 595)

On July 30, 1943, the Federal Power Commission rendered its decision and made a determination and order requiring petitioner to file with said Commission an application for a license under the Federal Power Act for the operation and maintenance of said dam. (R. 595-613)

On August 26, 1943, petitioner filed an application for rehearing. (R. 614) Said application was denied on September 21, 1943. (R. 621)

On October 5, 1943, petitioner filed with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit its petition for review of said order of the Federal Power Commission, and a statement of points. (R. 629 to 633) On February 26, 1945, said court affirmed the order of the Commission. (R. 644)

On February 26, 1887, the Legislature of Wisconsin, by Ch. 12 of the Laws of Wisconsin for 1887, granted a permit for the construction of the dam in question in the Wisconsin River at Tomahawk. (R. 540) Petitioner in July, 1936,

acquired said dam, including the permit so granted. (R. 471) The dam was in existence in May, 1889. (R. 415, 457, 645) The Public Service Commission of Wisconsin in 1933 having found the dam in bad condition and dangerous, ordered the same repaired and made safe. (R. 16, 48, 465-471)

The Wisconsin River is located wholly in Wisconsin, having its source near the northern border. It empties into the Mississippi near Prairie du Chien, Wisconsin. It is 430 miles long. (R. 597) Tomahawk Dam is located 100 miles from the source and 330 from the mouth of the river. (R. 224)

Log driving was conducted on the upper part of the river, where Tomahawk is located, to points as far down as Wisconsin Rapids, 216 miles from the mouth of the river. (R. 145, 224)

Log driving on the Wisconsin River ceased about 1915. (R. 112, 115) No logs were driven past Tomahawk since 1907. (R. 603)

Rafts of lumber were floated from, but not above, Merrill, Wisconsin, and from points below Merrill down the Wisconsin, and into the Mississippi River. (R. 127) Merrill is 28 miles below Tomahawk. (R. 224) No lumber was rafted past Tomahawk. (R. 85, 127, 362) Rafting at Merrill ceased in 1880, (R. 87), and all rafting operations on the river ceased in 1887-88. (R. 121, 199, 602, 603)

There is no record of steamboats operating above Wausau. Such steamboats as operated above Wisconsin Rapids for a short time were limited to local operations between Stevens Point and Mosinee, and between Mosinee and Wausau. (R. 286) The decision of the Federal Power Commission refers to no steamboat operations in that portion of the river later than 1880. (R. 605)

Use of the river for logging and rafting has accordingly completely ceased and no commerce is carried on the river. Pleasure boats operate through the Dells at Kilbourn, Wisconsin, almost 200 miles below Tomahawk. (R. 267, 203, 354)

During the period when rafting operations were carried on great loss of life resulted. At Mosinee alone over 100 persons lost their lives in rafting lumber over the falls. In some years as many as 10 persons were drowned there. (R. 366) Loss of life on the river in the process of rafting lumber was a common occurrence. (R. 387) At Trappe Rapids 14 persons were drowned one season. (R. 362) The record contains *specific* references to 13 lives lost by drowning at Mosinee, or one-seventh of the total of 100 referred to. If the other references in the record to *specific* instances of drowning were multiplied by seven, the total drownings would seem to approximate 350.

Not only was there great loss of life, but there was a great loss of the logs and timber, due to the rapids, sand bars, becoming water-soaked, and other causes. (R. 192, 88, 367, 558) The loss involved in rafting lumber was often as much as one-fourth. (R. 425) As soon as a suitable method of getting lumber out was found, rafting ceased. (R. 192, 234, 235)

Nor is it feasible to improve the river for the purpose of making use thereof possible. From Portage to Merrill it was not worthy of improvement, and prospective commerce did not justify the outlay. (R. 563) Huge sums would be required to make the improvements (R. 192), and the improvements were not deemed economically justifiable. (R. 249, 258, 263, 588). Even the lower part of the river, which with the Fox River formed a route for early traffic from the Mississippi to Portage and to Green Bay, Wisconsin, was not

deemed suitable for improvements, (R. 312) and in 1887 attempts to improve the section from the Mississippi to Portage were abandoned. (R. 588)

The wheels of the power plant at the dam will use 2,000 cubic feet per second. (R. 27) The flow of the river at such point averaged 2,020 c.f.s. from October 1, 1915, to September 30, 1935. When the flow of the river is below that amount the water is withheld for a period each day so as to build up the flow. (R. 56) It is released each day, so that the actual flow of the river passes down each day. (R. 29) This operation creates waves, which, however, will on account of natural conditions, disappear within a distance of 125 miles below Tomahawk. (R. 144) Any wave created at Tomahawk is artificially ironed out at Alexander Dam, 23 miles below. (R. 224, 28) Within that distance there is no use being made of the river for interstate commerce.

Rafting of lumber ceased entirely by 1887. (R. 121, 199) The river is not now suitable for the rafting of lumber as that method of use has long been outmoded. (R. 415, 228) The opinion of the Commission that the Wisconsin River is navigable water of the United States is based wholly on past use. (R. 603, 610, 611) Nor can it be made suitable for use at an expenditure of money at all commensurate with the benefits. (R. 192, 249, 258, 263, 563)

## SPECIFICATION OF ERRORS

The errors which petitioner will urge if the petition for certiorari is granted are that the United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In not setting aside the order of the Federal Power Commission on the ground that the Federal Power Act does not apply to Tomahawk Dam, inasmuch as it was constructed

under a state license prior to the enactment of the Federal Power Act and before Congress enacted legislation in respect thereto, and inasmuch as, under the language of the Act, it was excepted from the operation of the Federal Power Act; and therefore the Commission had no jurisdiction to require petitioner to take out a license under the Act.

2. In making no distinction as between (a) navigable waters of the United States which are used or suitable for use for transportation in interstate commerce, and (b) those which are not so used or suitable for use—a distinction which is required by a proper construction of the Federal Power Act, and which determines whether a license must be taken out under the Act, or whether a license is granted automatically thereby in the event the interests of interstate or foreign commerce are not affected by a dam.

3. In not setting aside the order of the Federal Power Commission on the ground that the Wisconsin River at Tomahawk, Wisconsin, even though at that point it is a navigable water of the United States over which Congress has jurisdiction, is not "used or suitable for use for the transportation of persons or property in interstate or foreign commerce," and that therefore the Commission had no jurisdiction to require petitioner to take out a license under the Federal Power Act (the interests of interstate and foreign commerce not being affected by the dam).

4. In not setting aside the order of the Federal Power Commission on the ground that the interests of interstate commerce would not be affected by Tomahawk Dam, even on the assumption that the Wisconsin River at that point was subject to the jurisdiction of Congress, though not a navigable water as defined in the Act.

5. In not considering and determining whether there is

substantial evidence to support the finding of the Commission that the interests of interstate or foreign commerce were affected by the dam, which want of consideration is presumably the result of 2 above.

## ARGUMENT

### POINT I

**The Federal Power Act by its terms is not to be construed as affecting any permit or any authority granted pursuant to law prior to its enactment. Tomahawk Dam was constructed pursuant to a permit granted by Wisconsin in 1887 before the Federal Government in 1890 by enactments of general application in respect of navigable rivers entered the field of regulation, and the dam is therefore excepted from the operation of the Act.**

The Federal Power Act was enacted June 10, 1920, and Section 23 (a) thereof (Title 16 U.S.C.A., § 816) provides as follows:

> "The provisions of sections 791-823 of this title shall not be construed as affecting any permit * * * granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, * * *."

Section 23 (b) thereof (Title 16 U.S.C.A., § 817) provides in part as follows:

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, * * * in any of the navigable waters of the United States, * * * except under and in accordance with the terms of a permit * * * granted prior to June 10, 1920, or a license granted pursuant to this chapter."

The question is whether the permit and authority referred to above includes a permit granted by a state.

The first enactment by Congress of general application to navigable rivers was the Rivers and Harbors Act of September 19, 1890.

The permit to construct, maintain and repair the dam was obtained from the Legislature of Wisconsin on February 26, 1887, under Chapter 12 of the Laws of Wisconsin for the year 1887. (R. 540) Work was immediately commenced and the dam was in existence in 1889 (R. 415, 645) which was approximately a year before the enactment of the Rivers and Harbors Act of 1890, and consequently before Congress entered the field of regulation.

That the franchise granted by the State of Wisconsin under those circumstances was a valid permit is established (a) by the decisions of this court, (b) by reference to the pertinent language of the Rivers and Harbors Acts of 1890, of 1899, and of the Federal Power Act, and (c) by statements in Congress when the Federal Power Act was before it for consideration.

In *City of Newark, et al. vs. Central Railroad Company of New Jersey, et al.*, 267 U. S. 377, 381, a question arose as to the right to reconstruct a bridge over a navigable water of the United States, the bridge having been built pursuant to a state license. The court said:

> [267 U. S. 381] "At the time the bridge was built, there was no applicable legislation by Congress. And it was within the power of the State to authorize its construction."

In *Pound vs. Turck*, 95 U. S. 459, it was argued that the State of Wisconsin had no power to grant a permit to build a dam in the Chippewa River, and that the statute was repugnant to the provision of the Constitution giving Congress authority to regulate commerce. On that the court said:

> [95 U. S. 462] "* * * The proposition is not a new one in this court, and cannot be sustained as applicable to the case before us without overruling many well-considered decisions, no one of which has ever been overturned, though the doctrine announced has been occasionally questioned."

Other cases establishing the right of a state to grant permits for erection of structures in or over navigable waters prior to the time of the assumption by Congress of jurisdiction are:

> **Willson and others vs. The Black Bird Creek Marsh Company, 27 U. S. 245, 250;**
>
> **Gilman vs. Philadelphia, 70 U. S. 713, 729, 732;**
> **Cardwell vs. American Bridge Company, 113 U. S. 205, 208, 209;**
>
> **International Bridge Company vs. People of the State of New York, 254 U. S. 126, 132.**

The language of the Rivers and Harbors Acts of 1890, of 1899, and of the Federal Power Act shows that Congress intended by the reference to a permit "given pursuant to law" (the language of the Federal Power Act) a permit from a state.

The Rivers and Harbors Act of September 19, 1890 (C. 907, 26 Stats. 454, 455) provided that the creation of any obstruction to navigable capacity was prohibited unless *"affirmatively authorized by law."* In the Rivers and Harbors Act of 1899 (Title 33 U.S.C.A. § 403), the prohibition applied unless the creation of the obstruction was *"affirmatively authorized by Congress."*

When the Federal Power Act was enacted the term *"permit * * * given pursuant to law"* was used, which is generally similar to the language "authorized by law" used in the Rivers and Harbors Act of 1890.

In *United States vs. Bellingham Bay Boom Co.*, 176 U. S. 211, at 215, it was said in reference to the Rivers and Harbors Act of 1890 that it must be assumed that Congress was well aware of the fact that an obstruction built under state authority was "*authorized by law*". It must also be assumed that when Congress enacted the Federal Power Act and used the term "permit given pursuant to law," it also was aware of the fact that an obstruction built under state authority was built under a "permit given pursuant to law."

In *Wisconsin, et al. vs. Illinois, et al.*, 278 U. S. 367, 412, the language in the Rivers and Harbors Act of 1899 as compared with the language in the 1890 Act was said to be intended to make mere state authorization inadequate, thus recognizing that under the language of the Act of 1890 (which is generally like that in the Federal Power Act) state authorization was adequate.

Neither the Rivers and Harbors Act of 1890 nor of 1899 was retroactive so as to make unlawful a structure which was lawful at the time it was built under state authority.

**United States vs. Bellingham Bay Boom Co., 176 U. S. 211, 214, 215;**
**Gring vs. Ives, 222 U. S. 365, 370.**

Congress at the time of the adoption of the Federal Power Act was aware that many structures had been erected in navigable waters under permits granted by states. That Congress intended to exclude them from the operation of the Federal Power Act is shown by the statements on the floor of the House by the Chairman of the Committee, as shown by the Congressional Record, Volume 56, Part 9, Pages 9047 and 9048.

The following is the substance of the statements in the Record:

Reference was made to Section 23 of the Federal Power Act and to the term "permit * * * given pursuant to law * * *," and specific reference was made to the fact that there were in existence in navigable waters dams and other structures under franchises and permits from the states. A question was raised as to the effect of Section 23 of the Federal Power Act upon those structures, and the Chairman was asked specifically as to whether he took the position "* * * that existing rights granted by charter by any State are not interfered with by the provisions of this bill," and to this he replied "Absolutely," and that they would not be interfered with, nor would conditions be added to them unless they voluntarily came in under the Act, as the Act permitted they might do.

That there were many such dams in the Wisconsin River and its upper tributaries is shown in the Record. (R. 224, 225) There are also many such dams in other states.

In the opinion of the court below it is said that the plain language of Section 23 of the Federal Power Act makes it unlawful to construct, operate or maintain a dam in a "navigable water of the United States" without a license, and that Congress did not mean to allow existing obstructions to continue unregulated.

It is respectfully submitted that the history of the two Rivers and Harbors Acts referred to, and of the Federal Power Act, and the statements of this court that dams erected under state license were "affirmatively authorized by law," lead to a contrary conclusion, to-wit, the conclusion that dams constructed prior to 1890 under state authorization in navigable waters of the United States are not subject to the Federal Power Act.

The matter is of such vital importance to the public, to state regulatory bodies, and to the many owners of dams

throughout the United States, as to make the determination by the Supreme Court of the question here presented desirable.

## POINT II

**The Circuit Court of Appeals construed the Federal Power Act as requiring an application for a license to maintain a dam, irrespective of whether or not at the point involved the river was used or suitable for use in interstate commerce. Such construction is not warranted.**

The Wisconsin River at Tomahawk Dam is no longer used or suitable for such use. This appears from the statement of the case, pages 8-10. Accordingly, under the Act, a license from the Commission is required only if the interests of interstate commerce are affected by the dam. Because of the lower court's construction of the statute it did not pass upon the question as to whether the Commission's findings that the dam affected interstate commerce were supported by substantial evidence, considering as final the question of whether substantial evidence supported the finding that the "Wisconsin River was and is a navigable water of the United States."

In the presentation of this argument it will be helpful to resort to the following sketch and analysis:

The following line represents a river over which Congress has jurisdiction by virtue of its power to regulate interstate commerce. The line includes both that portion of the river which is not used or suitable for use in the transportation of persons and property in interstate commerce, as well as the portion which is so used or is suitable for such use.